

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The regular hearing was held in this proceeding on August 26, 1992. At that time the Administrative Law Judge set claimant's terminal date for October 31, 1992. Without requesting an extension of terminal date, claimant's deposition, along with that of another witness, was taken and submitted as evidence in April 1993. One month later, claimant presented the testimony of a medical expert. One month after that, claimant took the deposition of another physician. The respondent and Workers Compensation Fund lodged no objections to the taking or submission of this evidence because of the expiration of claimant's terminal date. On August 11, 1994, over a year and a half after her terminal date had expired, claimant filed her submission letter. At that point, respondent requested an extension of its terminal date until November 25, 1994. Claimant vehemently objected to such an extension. Several letters were written between the Administrative Law Judge and counsel in which claimant's counsel continued to both object to the extension of respondent's terminal date and request an immediate decision. After warning claimant of his intention to do so and with claimant still demanding an immediate decision, the Administrative Law Judge granted claimant's request for an immediate decision and struck claimant's evidence from the record because it had been taken after the terminal date. Because there was now no evidence to consider, the Administrative Law Judge found claimant did not satisfy her burden of proof and denied all benefits.

This is the first time the Appeals Board has encountered this situation where the claimant, after submitting all of its evidence after the expiration of its terminal date, objected to the respondent's request for extension of its terminal date. At least the respondent requested an extension of its terminal; an act the claimant failed to do at anytime. Apparently claimant's counsel believed it was permissible for him to disregard terminal dates, but unjust for the respondent to do the same. Likewise, this is the first instance we have observed where the claimant's attorney has challenged the Administrative Law Judge to the point of provocation. Claimant's attorney now appears before us with unclean hands.

The Workers Compensation Act provides the parties shall have reasonable opportunity to be heard and present their evidence. See K.S.A. 44-523. The same statute also provides terminal dates may be extended on application for good cause shown.

Because the Appeals Board recognizes the extreme importance of the enforcement of terminal dates, the Appeals Board will rarely disturb the control and enforcement of same by the Administrative Law Judge. However, despite the actions of claimant's attorney in this case, justice requires the case be remanded for decision by the Administrative Law Judge after a review of all the evidence, including claimant's, and after giving the respondent and the Workers Compensation Fund a reasonable opportunity to present their evidence. To hold otherwise is to deny justice.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that this proceeding be remanded to the Administrative Law Judge to determine the issues after considering all the evidence presented and after allowing the respondent and Workers Compensation Fund a reasonable opportunity to submit their evidence.

IT IS SO ORDERED.

Dated this ____ day of April, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER**DISSENT**

I respectfully dissent from the opinion of the majority. K.S.A. 44-523 requires that the Administrative Law Judge shall set terminal dates for the parties and grants an extension of the forgoing thirty day time limit specified in the statute for the following reasons:

- "(1) If all parties agree;
- (2) if the employee is being paid temporary or permanent total disability compensation;
- (3) for medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice of the appointment sent prior to submission by the claimant; or
- (4) on application for good cause shown."

In this instance the claimant's attorney, after going well beyond his terminal date, objected to an extension request by the respondent. Claimant's attorney has sown this field of weeds and should not be entitled to now object to the harvest. I would affirm the Administrative Law Judge and deny benefits to the claimant due to claimant's failure to carry her burden of proof as required by K.S.A. 44-501.

BOARD MEMBER

c: David L. McLane, Pittsburg, KS
Garry W. Lassman, Pittsburg, KS
William L. Phalen, Pittsburg, KS
John D. Clark, Administrative Law Judge
George Gomez, Director